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INTERDEALS AUTOMATION (M) SDN BHD

v.

HONG HONG DOCUMENTS SDN BHD

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: P-02-794-2004]

C

26 NOVEMBER 2008

CONTRACT: *Sale of goods - Unpaid seller, remedies for - 'Romalpa clause' - Whether contract subject to Romalpa clause - Whether property in goods had passed to purchaser - Order for return of goods to seller -*

D *Whether erroneous and unwarranted - Whether could recover price of goods sold and delivered - Sale of Goods Act 1957, ss. 20, 55, 56*

The plaintiff/appellant had sold and delivered a machine called Kern Page Mailer 18000 to the defendant/respondent for

E RM190,000. It was a term of the agreement, as evidenced by a purchase order dated 24 June 1993, that the defendant was to pay 30% of the purchase price upon delivery of the machine and the balance not later than seven days after its testing and commissioning. However, notwithstanding the delivery and

F commissioning, the defendant refused to pay for the machine and the plaintiff hence commenced an action to recover the price of the goods sold and delivered. Before the learned judge, the defendant argued that the claim must fail as the machine was not of merchantable quality, that there was misrepresentation by the

G plaintiff and that the plaintiff, having still retained the title to the machine, could not be entitled to its price. The learned judge found for the plaintiff for the first two defences, but ruled that by reason of an endorsement appearing on the plaintiff's invoices dated 12 August 1993 and 23 October 1993 respectively, title to

H the machine must remain with the plaintiff. The learned judge hence ordered for the return of the machine to the plaintiff, and further ruled that the plaintiff's remedy lay only in damages under s. 56 of the Sale of Goods Act 1957 ('the Act'). This aside, the defendant's counterclaim was also dismissed and hence the appeal

I and cross appeal by the plaintiff and the defendant herein.

Held (allowing plaintiff's appeal partly and dismissing defendant's cross appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is settled law that parties to a contract for the sale of goods may agree that the ownership in them would only be transferred from the vendor to the buyer when the latter has met all his or her obligations contained in the contract. Such a term in the contract for the sale of goods, styled as *"Romalpa* clause*"*, has the effect of making the buyer a trustee or fiduciary of the goods for the seller. Central to this proposition is that the *Romalpa* clause must be a term of the contract. Hence, the question here is whether the endorsement appearing on the invoices that came well after the purchase order is a term of the contract. (para 6)

(2) The position in law is that once a contract is already concluded then a stipulation imposed subsequently does not form an integral part of the contract unless the parties accept it by way of a variation. (*Chapelton v. Barry UDC*). (para 7)

(3) In this case, the contract for sale was formed when the defendant accepted the terms set out in the purchase order. The invoices came later. There is no finding by the judge - indeed there is no evidence to support an inference - that the parties had varied their original contract to include the *Romalpa* stipulation that appeared on the invoices. The *Romalpa* stipulation therefore does not bind the parties. It follows that the learned judge fell into error by relying on the invoices. (para 8)

(4) Once it is accepted that the contract contained no *Romalpa* clause, no question of affording the plaintiff the right to re-take possession of the machine arises. It is the general rule of construction housed in s. 20 of the Act that applies. In consequence, it does not matter that the defendant was to pay the price in two stages. Property in the machine had passed from the plaintiff to the defendant when the contract was made. There is also abundant evidence on record to support the irresistible inference that the defendant did in fact

A accept the machine and put to its benefit. As such there is no room for the application of s. 56 of the Act which has to do with non-acceptance of goods by a buyer. (para 9)

(5) This is a case in which there was an acceptance of goods and
B a refusal to pay for them. Accordingly, the applicable provision is s. 55(1) of the Act which prescribes the remedy for the unpaid seller. It follows that the learned judge ought to have applied this section and found for the plaintiff on the ground that it was an unpaid seller of goods that had been delivered,
C accepted and used by the defendant to its benefit. In the circumstances, this court would allow the appeal in part and set aside so much of the judgment of the High Court that requires the return of the machine to the plaintiff in favour of a judgment for the plaintiff for the sum of RM190,000.
D (paras 10 & 11)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu telah menjual dan menghantarserah kepada defendan/responden sebuah jentera yang bernama Kern Page
E Mailer 18000 dengan harga RM190,000. Menjadi satu terma perjanjian, seperti yang terserlah dari pesanan pembelian bertarikh 24 Jun 1993, bahawa defendan bertanggungan untuk membayar 30% harga belian semasa mesen dihantarserah dan bakinya tidak kurang dari tujuh hari selepas mesen ditauliahkan. Namun begitu,
F walaupun mesen telah dihantarserah dan ditauliahkan, defendan telah enggan membayar harganya, berakibat plaintif memulakan tindakan bagi menuntut harga barang yang dijual dan dihantarserah tersebut. Di hadapan yang arif hakim, defendan berhujah bahawa tuntutan seharusnya gagal kerana mesen tidak dapat digunakan,
G bahawa terdapat misrepresentasi di pihak plaintif dan bahawa, memandangkan harta dalam mesen masih dipegang oleh plaintif, maka plaintif tidak berhak kepada harganya. Yang arif hakim mendapati untuk plaintif bagi dua hujah yang pertama, namun memutuskan bahawa berdasarkan kepada endorsmen yang wujud
H pada inbois-inbois plaintif bertarikh 12 Ogos 1993 dan 23 Oktober 1993, harta kepada mesen masih dipegang oleh plaintif. Yang arif hakim dengan itu memerintahkan supaya mesen dikembalikan oleh

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defendan kepada plaintif, dan seterusnya memutuskan bahawa remedi plaintif hanya berbangkit di bawah s. 56 Akta Jualan Barangan 1957 ('Akta'). Selain itu, tuntutan balas defendan juga telah ditolak sekaligus membangkitkan rayuan dan rayuan balas oleh plaintif dan defendan di sini.

Diputuskan (membenarkan rayuan plaintif sebahagiannya dan menolak rayuan balas defendan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Sudah menjadi undang-undang yang diterimapakai bahawa pihak-pihak kepada kontrak penjualan barangan boleh bersetuju bahawa keempunyaan terhadap barangan akan hanya berpindah dari penjual kepada pembeli apabila pihak terkemudian memenuhi kesemua obligasi-obligasinya di dalam kontrak. Terma dalam kontrak penjualan barangan sedemikian, dikenali sebagai "fasal *Romalpa*", mempunyai kesan menjadikan pembeli sebagai pemegang amanah barangan atau fidusiari kepada penjual. Teras kepada proposisi ini adalah bahawa fasal *Romalpa* tersebut hendaklah menjadi satu terma di dalam kontrak. Oleh itu, persoalannya di sini adalah sama ada endorsmen yang terdapat pada inbois-inbois yang berbangkit kemudian dan selepas pesanan pembelian merupakan satu terma kepada kontrak.

(2) Kedudukannya di sisi undang-undang adalah bahawa sebaik sahaja sesuatu kontrak itu dimeterai, maka apa jua stipulasi yang dimasukkan kemudian dari itu bukan merupakan bahagian integral kontrak kecuali ianya diterima oleh pihak-pihak melalui variasi.

(3) Dalam kes di sini, kontrak penjualan dimeterai apabila defendan menerima terma-terma yang termaktub di dalam pesanan pembelian. Inbois-inbois datang kemudian dari itu. Tiada dapatan dibuat oleh yang arif hakim - dan malah tiada keterangan untuk menyokong inferens - bahawa pihak-pihak telah mengubah kontrak asal bagi memasukkan stipulasi *Romalpa* yang terdapat pada inbois-inbois. Oleh itu stipulasi *Romalpa* tidak mengikat pihak-pihak. Ianya mengikut bahawa yang arif hakim khilaf apabila bergantung kepada inbois-inbois.

(4) Sebaik sahaja ianya diterima bahawa kontrak tidak mengandungi fasal *Romalpa*, maka persoalan memberikan hak kepada plaintif untuk mengambil kembali milikan mesen sudah tidak berbangkit. Yang terpakai adalah kaedah am yang termaktub di dalam s. 20 Akta. Akibatnya, ia bukanlah sesuatu yang penting bahawa defendan perlu membayar harga belian dalam dua peringkat apabila kontrak dimasuki. Juga terdapat keterangan yang banyak di atas rekod bagi menyokong inferens tidak dapat tidak bahawa defendan sebenarnya telah menerima mesen dan menggunakan mesen untuk manfaatnya. Oleh itu tiada ruang untuk pemakaian s. 56 Akta yang berkait dengan ketidak-terimaan barangan oleh si pembeli.

(5) Ini adalah kes di mana terdapat penerimaan barangan dan keengganan untuk mebayar harganya. Oleh yang demikian, peruntukan yang terpakai adalah s. 55(1) Akta yang memperuntukkan remedi bagi penjual yang tidak dibayar. Ianya mengikut bahawa yang arif hakim harus menggunapakai seksyen ini dan memutuskan untuk plaintif atas alasan bahawa ia merupakan penjual yang tidak dibayar bagi barangan yang telah dihantarserah, diterima dan digunakan oleh defendan untuk manfaatnya. Oleh yang demikian, mahkamah membenarkan rayuan plaintif sebahagiannya, dan mengenepikan penghakiman setakat bahagian yang memerintahkan supaya mesen dikembalikan kepada plaintif untuk diganti dengan penghakiman kepada plaintif untuk jumlah RM190,000.

Case(s) referred to:

Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd [1976] 2 All ER 552 ***(refd)***

Chapelton v. Barry UDC [1940] 1 KB 532 ***(refd)***

Legislation referred to:

Sale of Goods Act 1957, ss. 20, 55(1), 56

For the appellant - K Anantham (Gurbakash Singh with him); M/s Skrine & Co

For the respondent - Christina Siew; M/s Lim Khean Siew & Co

[Appeal from High Court, Pulau Pinang; Suit No: 22-113-94]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This appeal has to do with the remedies available to an unpaid seller of goods. The facts are these. The plaintiff (the appellant before us) and the defendant (respondent before us) entered into an agreement for the sale and purchase of a unit of machinery called a Kern Page Mailer 18000 at a purchase price of RM190,000. Under the terms of the agreement evidenced by a purchase order dated 24 June 1993, the defendant was to pay 30% of the purchase price on delivery of the machine and the balance not later than seven days after its testing and commissioning, subject to the attendant engineers satisfaction. It is in evidence that the defendant acknowledged delivery of the machine in good order and condition on 20 October 1993. It is also in evidence that the plaintiff's personnel installed the machine, tested and commissioned it and trained the defendant's personnel in the use of it. The defendant acknowledged this and accepted the machine as commissioned on 23 October 1993. Despite all this, the defendant did not pay the plaintiff. And so, the plaintiff commenced an action to recover the price of the goods sold and delivered, that is to say, the price of the machine and of a 15 kg tin of glue.

[2] The defendant raised a number of defences. First, the machine was not reasonably fit for its purpose or was not of merchantable quality. Second, the plaintiff had misrepresented to the defendant, *inter alia,* about the performance of the machine. Third, the plaintiff was not entitled to the price of the machine as it had expressly retained title to the machine. Fourth, in the event that the defendant was liable in damages, the plaintiff had failed to mitigate its losses. It also mounted a counterclaim.

[3] At the conclusion of the trial, the learned judge found for the plaintiff on the first two defences taken. He held that the goods were of merchantable quality and that there had been no misrepresentation. He however held that title to the machine remained with the plaintiff and that its remedy lay in damages under s. 56 of the Sale of Goods Act 1957 ("the Act"). He also held that the plaintiff was under a duty to mitigate damages; that it had failed to do so or to adduce evidence of its losses. Lastly,

A he directed the defendant to return the machine to the plaintiff. The plaintiff has now appealed against the learned judge's decision. As for the counterclaim, the judge dismissed it and the defendant has cross appealed against that dismissal.

B **[4]** The first question that needs to be addressed is whether there was retention of title by the plaintiff. The answer to this question must be found from within the terms of the contract. What then is the contract in this case? The plaintiff argues that the purchase order dated 24 June 1993 sets out the terms of the C contract which were accepted by the defendant. It is therefore the contract between the parties. There is nothing in that document that reserves title in the plaintiff. Accordingly, the judge was in error in holding otherwise.

D **[5]** Now, it is clear from the judgment under appeal that the judge appears to have accepted that the purchase order of 24 June 1993 is the contract between the parties. Because, there is a finding by him to the effect that the contract was concluded when the defendant agreed to pay 30% of the purchase price on delivery and the balance 70%, seven days after testing and E commissioning, subject to it's engineer's satisfaction, which are the terms found in the purchase order. However, the learned judge went on to hold that by reason of an endorsement appearing on the plaintiff's invoices dated 12 August 1993 and 23 October 1993, the plaintiff had reserved title to the machine. Hence, F property in the machine had not passed to the defendant.

[6] It is settled law that parties to a contract for the sale of goods may agree that the ownership in them would only be transferred from the vendor to the buyer when the latter has met G all his or her obligations contained in the contract. See, *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd* [1976] 2 All ER 552. Such a term in a contract for the sale of goods (styled a "*Romalpa* clause") has the effect of making the buyer a trustee or fiduciary of the goods for the seller thereby entitling the latter to H trace them into the hands of third parties to whom the buyer may transfer them. Central to this proposition is the postulate that the Romalpa clause must be a term of the contract. The question here is whether the endorsement appearing on the invoices that came well after the purchase order is a term of the contract.

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[7] Whether a particular stipulation is a term of a contract is essentially one of construction. The position in law is that once a contract is already concluded then a stipulation imposed subsequently does not form an integral part of the contract unless the parties accept it by way of a variation. This governing principle is illustrated by the facts of *Chapelton v. Barry UDC* [1940] 1 KB 532. The plaintiff in that case was at a seaside resort. He wanted to hire a deck chair. He went to pile of deck chairs belonging to the defendant. There was a notice nearby. It read: "Barry Urban District Council. Cold Knap. Hire of chairs 2 pence. per session of 3 hours." The notice went on to request members of the public to obtain tickets for their chairs from the chair attendants. It also said that the tickets should be retained for inspection. The notice contained no exemption clause. The plaintiff took two chairs for which he paid 4 pence. He then collected a receipt from the attendant which did contain a clause exempting the defendant from liability. The plaintiff used the deck chair, fell and was injured. In an action brought by the plaintiff the defendant pleaded the exemption clause. It was held that the exemption clause on the receipt did not bind the plaintiff. The contract was concluded when the plaintiff took the deck chairs and paid for them. The exemption clause had come later. It was therefore not an integral part of the contract, that is to say, it was not a term of the contract.

[8] So too here. The contract for sale was formed when the defendant accepted the terms set out in the purchase order. The invoices came later. There is no finding by the judge – indeed there is no evidence to support an inference – that the parties had varied their original contract to include the *Romalpa* stipulation that appeared on the invoices. The *Romalpa* stipulation therefore does not bind the parties. It follows from what I have said thus far that the learned judge fell into error by relying on the invoices.

[9] Once it is accepted, as I have, that the contract contained no *Romalpa* clause, no question of affording the plaintiff the right to retake possession of the machine arises. It is the general rule of construction housed in s. 20 of the Act that applies. That section provides:

> 20. Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.

So here. It does not matter that the defendant was to pay the price in two stages. Property in the machine passed from the plaintiff to the defendant when the contract was made. I must add that there is abundant evidence on record to support the irresistible inference that the defendant did in fact accept the machine and put it to its benefit. As such there is no room for the application of s. 56 of the Act which has to do with the non-acceptance of goods by a buyer. The section reads:

> 56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may sue him for damages for non-acceptance.

[10] As I have already said, this is not a case of non-acceptance. It is a case in which there was acceptance of goods and a refusal to pay for them. Accordingly, the applicable provision is s. 55(1) of the Act which prescribes the remedy of an unpaid seller. And this is what it says:

> Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

In my judgment, the learned judge should have applied this section and found for the plaintiff on the ground that it was an unpaid seller of goods that had been delivered, accepted and used by the defendant to its benefit. As for the counterclaim, once the judge found against the defendant on the issues that went to the avoidance and breach of the contract he was obliged to dismiss it. I would therefore uphold his decision on that part of the case.

[11] For the reasons already given, I would allow the appeal in part and set aside so much of the judgment of the High Court as requires the return of the machine to the plaintiff. I would in its place enter judgment for the plaintiff in the sum of RM190,000. I would also affirm the High Court's judgment that the defendant

pay the plaintiff the price of the glue supplied. The defendant must pay the costs of this appeal. The order for costs made by the High Court is affirmed. The defendant's cross appeal is dismissed with costs and the order dismissing its counterclaim is affirmed. The deposit in court shall be refunded to the plaintiff.

[12] My learned brothers Mohd Ghazali bin Mohd Yusoff and Tengku Baharudin Shah bin Tengku Mahmud, JJCA have seen this judgment in draft and have expressed their agreement with it.